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No. 80-1849.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1980.

ROGER ARSENAULT,
PETITIONER,

v.

ALLEGHENY AIRLINES, INC.,
RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Question Presented.

Whether the grant of Respondent's motion for summary judgment in this defamation action was appropriate when the record consisted of pre-trial affidavits, depositions and other documentary evidence, and Petitioner failed to adduce any evidence regarding whether Respondent had abused its conditional privilege.

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Respondent, Allegheny Airlines, Inc.,* respectfully opposes Petitioner Roger Arsenault's writ of certiorari to review the order and judgment of the United States Court of Appeals for the First Circuit entered on December 24, 1980.

Statement of the Case.

The Petitioner was an employee of the Respondent from approximately December, 1967 to August, 1976. In January, 1976, the Petitioner was found to have violated company and airline industry rules in misusing an employee pass for airline

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* Allegheny Airlines, Inc. was the corporate name of Respondent at the time this action was initiated; such name has since been changed to U.S. Air, Inc. Respondent has no parents, subsidiaries (other than wholly-owned subsidiaries) or affiliates.

travel. As a result, he was placed on probationary status and became subject to immediate termination for any further violation of company rules.

During the summer of 1976, Respondent began an investigation, in cooperation with the Massachusetts State Police, into the misappropriation of company funds by airline ticket agents at Respondent's Logan International Airport operation in Boston. During the course of the investigation, Respondent learned that Petitioner had informed the principal suspect of the investigation that he was the target of an undercover operation being conducted by Respondent and the police. In subsequent questioning, both Petitioner and the suspect admitted to Respondent that Petitioner had informed the suspect of the investigation.

As a result of this information, Respondent determined that it would terminate Petitioner. In this connection, Petitioner's superiors examined the company's personnel policy guide and concluded that the most appropriate section governing Petitioner's conduct was that dealing with "aiding and abetting" another employee in the misappropriation of company funds. Accordingly, in August, 1976, a senior official of Respondent wrote to Petitioner stating that Petitioner was being terminated for aiding and abetting another employee in the misappropriation of company funds. This letter was circulated only to a limited number of employees within the company directly involved in personnel matters.

Thereafter, on December 12, 1976, the Petitioner initiated the present action in the United States District Court for Massachusetts, alleging the letter was defamatory. After extensive discovery, the District Court, per Judge Mazzone, granted Respondent's motion for summary judgment on March 17, 1980, finding that Respondent's statements were conditionally privileged, as remarks by an employer about an employee's work record, and that there was no evidence dem-

onstrating that Respondent had acted with ill will or malice or otherwise abused this privilege. The District Court further noted as follows:

> We recognize the policy that cases should be decided at a trial on the merits. But where the record is so complete, as it is in this case, with pre-trial affidavits, depositions and other documentary evidence from every critical witness, the Court has the complete factual setting which demonstrates that the defendant, while perhaps not legally accurate, was fair.

On December 24, 1980, the First Circuit Court of Appeals affirmed the judgment of the District Court.

Argument.

1. PETITIONER'S TIME FOR FILING HIS WRIT OF CERTIORARI EXPIRED PRIOR TO RECEIPT OF PETITIONER'S WRIT BY THE COURT.

Petitioner originally filed his writ of certiorari with the Court on March 23, 1981, one day prior to the expiration of the time prescribed by the Court's rules for so doing. The Petitioner's initial filing was rejected as not being in conformance with applicable rules as to form, and Petitioner was allotted an additional twenty days to comply with the rules. However, Petitioner's second filing was also rejected for similar reasons. Finally, on May 4, 1981, Petitioner filed the instant writ of certiorari, at last in proper form but well after the twenty day leave period he had been allotted had expired. No leave to file late was requested, nor has such leave been granted. Thus, Petitioner's writ here is untimely and should be denied on that ground.

2. THIS DEFAMATION CASE INVOLVES A COMMONPLACE ISSUE REGARDING THE GRANT OF SUMMARY JUDGMENT, WHERE PETITIONER PRODUCED NO EVIDENCE TO OVERCOME A CONDITIONAL PRIVILEGE, AND THERE ARE THEREFORE NO SPECIAL OR IMPORTANT REASONS FOR GRANTING PETITIONER'S WRIT OF CERTIORARI.

Rule 17 of this Court sets forth the several factors or considerations relevant to a decision whether to grant review on a writ of certiorari. None of these considerations are present in the instant action. There is no conflict among appellate courts. And this case does not present an "important question of federal law which has not been, but should be, settled by this Court. . . ." Rather, what is presented to this Court for review is a familiar and uncontroversial issue—the appropriateness of summary judgment in a defamation action when a privilege has been asserted—which neither requires nor deserves the attention of this Court. See, e.g., *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Hahn* v. *Sargent*, 523 F. 2d 461 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976).

Petitioner's central contention is that certiorari is appropriate because the lower courts wrongfully relied on affidavits of Respondent's officials in finding an absence of the ill will or malice essential to overcome the privilege accorded to the Respondent's notification letter. This contention, however, misses the simple import of the opinions of both the District Court and the Court of Appeals—that Petitioner had failed to discharge his burden to produce *any* evidence which would give rise to an inference that the conditional privilege accorded the letter had been lost. The District Court put it this way:

> Viewing the record and the inferences which might be drawn therefrom in the light most favorable to the plain-

> tiff, the plaintiff has failed to show any evidence from which this court could infer malice or ill will by the defendant's agents [citation omitted].

The Court of Appeals agreed, finding that Petitioner had "failed to substantiate its summary allegations of abuse and malice" and "failed to make any showing that the overstatement was made in other than good faith, or that it was, at least, made 'in reckless disregard of others.' "

Petitioner would have this Court believe that the District Court and the Court of Appeals have adopted an unrestricted policy of granting summary judgment in cases of this sort simply on the basis of affidavits submitted by interested parties. While affidavits were submitted in support of its motion for summary judgment, the District Court correctly observed that the record before it also consisted of numerous depositions and other documentary evidence. Petitioner's contention that the court below relied primarily on the basis of affidavits submitted by Respondent's employees distorts and recasts the basis of the District Court's decision to grant summary judgment. The Respondent's motion for summary judgment was granted in the context of a complete factual record, a record to which Petitioner was unable to add any evidence of malice or ill will.

The case presented for review to this Court is thus legally simple and unexceptional. The Respondent established the existence of a conditional privilege which the Petitioner was unable to defeat by production of evidence demonstrating an abuse of the privilege. When a plaintiff cannot, as here, produce *any evidence* from which a court can infer malice or ill will, summary judgment is plainly appropriate. *First National Bank of Arizona* v. *Cities Service Co., supra,* 391 U.S. at 289; *Hahn* v. *Sargent, supra,* 523 F. 2d at 464; *John Anderson & Co. (Wool) Pty.* v. *Ludlow Jute Co.,* 569 F. 2d 696, 698 (1st Cir. 1978); *Briggs* v. *Kerrigan,* 431 F. 2d 967,

968 (1st Cir. 1970); *Boston Mutual Life Ins. Co.* v. *Varone*, 303 F. 2d 155, 161 (1st Cir. 1962); *Ragano* v. *Time, Inc.*, 302 F. Supp. 1005, 1010 (M.D. Fla. 1969); *Levesque* v. *Kings County Lafayette Trust Co.*, 293 F. Supp. 1010, 1013 (E.D. N.Y. 1968). A commonplace case of this sort, involving the application of accepted legal principles to a factual record, does not qualify for review under the standards set forth in this Court's rules and is undeserving of further judicial review.

Conclusion.

For the reasons set forth above, a writ of certiorari should be denied.

Respectfully submitted,

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